Supreme Court, U.S.
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In The
Supreme Court of the United States

JULIA ANDERSON, *et al.*,
Petitioners,
v.
TOWN OF DURHAM, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MAINE SUPREME COURT

BRIEF OF STATE OF FLORIDA GOVERNOR JOHN ELLIS "JEB" BUSH AND THE STATE BOARD OF EDUCATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*

Florida Governor Jeb Bush and the Florida State Board of Education ("State Board") respectfully submit this Brief as *amici curiae* pursuant to Sup. Ct. R. 37.2(a).[1] Like the State of Maine, the State of Florida has a long tradition of enabling students to attend the private religious or non-religious schools of their choice on public scholarships. However, unlike Maine, Florida has sought to perpetuate this tradition for most of its history because Florida respects the choices of students and their parents, considers discrimination against a class of persons solely because of their religious affiliation unjustifiable, and promotes sound secular objectives such as educational achievement.

Amici curiae have an interest in this Court's consideration of whether the Maine Supreme Court's interpretation of the First Amendment of the United States Constitution is consistent with, among other decisions of this Court, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *Locke v. Davey*, 540 U.S. 712 (2004), because several crucial neutral scholarship programs rooted in Florida's educational heritage may be overturned based on a similar construction of the Constitution by the Florida First District Court of Appeal. The Florida appellate court struck a neutral K-12 scholarship program under Florida's Blaine amendment because religious schools participated and held its action consistent with the federal Free Exercise and Equal Protection Clauses. *See Bush v. Holmes*, 886 So. 2d 340 (Fla. 1st Dist. Ct. App. 2004) (*en banc*) *aff'd in part*, 919 So. 2d 392 (Fla. 2006). Florida's Blaine amendment, as interpreted by the Florida appellate court, is

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[1]Petitioners filed a blanket consent to the filing of briefs *amici curiae* and respondents have granted consent by letters filed with this Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the *amici curiae* or their counsel made a monetary contribution to the preparation of the brief.

identical in effect to ME. REV. STAT ANN. tit. 20, § 2951(2). *See Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006).

The Early History of Neutrality in Florida

Locke indicates that historical tradition is an important factor in determining whether an exclusionary public scholarship program on the basis of religion falls within the "play in the joints" between the federal religion clauses. *See* 540 U.S. at 722-23. Unlike in *Locke*, neutral educational scholarship funding has deep historical roots in both Maine and Florida. Florida's tradition dates back to the early-1800s, when the educational system was almost exclusively private and sectarian. Indeed, religious schools were virtually the only schools in Florida until the Civil War and, as such, the little public funding that existed for education was shared with them. *See* HARRY GARDNER CUTLER, HISTORY OF FLORIDA: PAST AND PRESENT 222-23 (1923). Even after the ratification of the Constitution of 1868, when Florida began to distinguish more carefully between public and private schools, the line was blurred. Private religious schools received public funding and it was not uncommon for a religious school to be designated as a public school. THOMAS EVERETTE COCHRAN, HISTORY OF PUBLIC-SCHOOL EDUCATION IN FLORIDA 52 (1921); *see also* Sister Mary Alberta, A Study of the Schools Conducted by the Sisters of St. Joseph of the Diocese of St. Augustine, Florida, 1866-1940, at 40 (Aug. 1940) (unpublished M.A. thesis, University of Florida).[2]

Neutral public funding for parochial education continued even after Florida adopted its post-Reconstruction Constitution of 1885, incorporating the State's first Blaine amendment and

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[2]For additional historical information about Florida's public funding of religious education, *see* Nathan A. Adams, IV, *Pedigree of an Unusual Blaine Amendment: Article I, Section 3 Interpreted and Implemented in Florida Education*, 30 NOVA L. REV. 1 (2005).

enacting the separate but equal educational doctrine. Fla. Const. Decl. of Rts., § 6 (1885) ("No preference shall be given by law to any church, sect or mode of worship and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution."); Fla. Const. art. XII, § 12 (1885) ("White and colored children shall not be taught in the same school, but impartial provision shall be made for both."). Neutral public funding did not lapse until the 1910s. *See* Alberta, *supra*, at 41-42 (Duval County erected a school building for the Sisters of Saint Joseph to conduct a common school seven years after enactment of the 1885 Constitution, which they did not "surrender" until around 1914); *see also id.* at 42-43 and MICHAEL J. MCNALLY, CATHOLIC PARISH LIFE ON FLORIDA'S WEST COAST, 1860-1968 149 (1996) (Pasco County erected a school building for Saint Anthony's in 1892 and Sacred Heart in 1916).

Demonstrating the linkage of Florida's Blaine amendment with bigotry, Florida began to enforce its Blaine amendment as anti-Catholic nativism peaked in the run up to World War I. *See* MCNALLY, *supra*, at 74 (Bishop Michael J. Curley wrote, "We Catholics . . . are victims of organized vilification and the government itself through the mails takes a hand by the distribution of lewd and lascivious anti-Catholic filth."). The press, legislature, governor and secret societies joined in anti-Catholic, anti-immigrant, and anti-black rhetoric. For example, the legislature adopted *An Act Prohibiting White Persons from Teaching Negroes in Negro Schools* aimed at the Sisters of St. Joseph and a *Convent Inspection Bill*. *Id.* at 74-75 (*Convent Inspection Bill*); Robert B. Rackleff, *Anti-Catholicism and the Florida Legislature 1911-1919*, 50 FLA. HIST. Q. 352, 353

(1972).[3] In one of the most thoroughly prejudicial speeches of the period fanning nativist fears, Governor Sidney J. Catts even warned that German Catholics in Florida were planning an armed-Negro insurrection for German Kaiser Wilhelm II, after which the Pope purportedly would relocate the Vatican to Florida and take political control. *See* MCNALLY, *supra*, at 78-79.

Neutrality After World War II

In the years following World War II, nativism subsided, and the Florida Legislature began approving the precursors to today's publicly-funded school choice programs, beginning with post-secondary education and expanding to pre-K through grade 12 education. In the 1950s, the Legislature approved public scholarships or loans for students to study teaching or nursing at any eligible Florida institution, including religious ones. Ch. 29726 § 2, 1955 Fla. Laws 231, 232-33 (teaching); Ch. 29819 § 2, 1955 Fla. Laws 572, 573-74 (nursing). The Legislature expanded these professional scholarship programs in succeeding years. *See, e.g.*, Fla. Stat. §§ 1009.54, 1009.57-.62, 1009.66, 1009.67 (2005).

In 1961, the Legislature enacted the precursor to the current-day Corporate Income Tax Credit ("CITC") Scholarship Program. The 1961 Program was designed to assist economically disadvantaged Florida high school graduates with college tuition. 1961 Fla. Laws 1091, 1092. It drew no distinction between religious and non-religious colleges. Today, the CITC Program enables K-12 students to attend the private religious or secular school of their parents' choice. Fla. Stat. § 1002.20(6) (2005). It provides income tax credits to corporations for contributing to scholarship funding

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[3]Both the adoption of the Blaine amendment and the nativism of the 1910s coincided with Catholic immigrant influxes into the State. *See* Adams, *supra* at 21-23, 29-34.

organizations, which, in turn, offer scholarships to economically disadvantaged students. *See* Fla. Stat. § 220.187 (2005).

In 1963, the Florida Legislature established the first need-based loan assistance program, benefitting eligible residents attending the public or private religious or non-religious colleges of their choice. 1963 Fla. Laws 1176, 1178, *codified at* Fla. Stat. § 239.67(4) (1967). Florida post-secondary educational loan assistance has since grown and diversified. *See, e.g.*, Fla. Stat. §§ 1009.50, 1009.52, 1009.89(3), 1009.891(3), 1009.73, 1009.72 (2005).

In 1965, the Legislature approved Florida Regents Scholarships, the precursor to today's Florida Bright Futures Scholarship Program ("Bright Futures"). The Florida Regents Scholarship Program provided state funds to eligible high school graduates to assist them in paying tuition costs at the accredited religious or non-religious college of their choice. 1965 Fla. Laws 1683, 1684, *codified at* Fla. Stat. § 239.451 (1967). Bright Futures, created in 1997, is a publicly-funded merit scholarship program that allows recipients to apply their scholarship money toward tuition at an eligible religious or non-religious college to pursue the degree of the recipient's choosing. Fla. Stat. §§ 1009.53, 1009.533 (2005).

Florida again demonstrated its commitment to religious neutrality in 1968, when the Legislature created a K-12 voucher program, enabling disabled students to attend private religious or non-religious schools. 1968 Fla. Laws 240, 243; *Scavella v. School Bd. of Dade County*, 363 So. 2d 1095, 1098 (Fla. 1978). This program was replaced by the McKay Scholarship Program ("McKay"). Fla. Stat. § 1002.39. McKay provides for payment by individual warrant made payable to eligible students' parents. *See* Fla. Stat. § 1002.39(6)(f) (2005).

The Florida Legislature enacted the Opportunity Scholarship Program in 1999, benefitting children attending K-12 public schools that received a failing grade for two out of four years. Fla. Stat. § 1002.38(2)(a)1. The OSP allowed parents to send their children to another public school or, like McKay, to receive a warrant for tuition at a private religious or non-religious school. Fla. Stat. § 1002.38(1) (2005). Participating schools had to agree, among other things, to "accept scholarship students on an entirely random and religious neutral basis" and not to "compel any student attending . . . on an opportunity scholarship to profess a specific ideological belief, to pray, or to worship." Fla. Stat. §§ 1002.38(3)(b), (4)(e), (j) (2005).

Under the OSP, eligible students enrolled in roughly equal numbers in eligible non-religious (45%) and religious (55%) schools. *See* OSP June Quarterly Report (2006) *available at* https://www.floridaschoolchoice.org/Information/OSP/quarterly_reports/osp_report_jun2006.pdf. Economically disadvantaged racial minorities were the primary beneficiaries. Roughly 93.9% of enrollees in the OSP were Hispanic-American or African-American, and 72% of enrollees qualified for free or reduced-price lunches. *Id.*

The OSP improved educational achievement among Florida's most needy populations. Hispanic-Americans and African-Americans experienced the most dramatic gains in educational achievement in Florida since 2001. For example, among third graders, 68% of Hispanic-Americans and 54% of African-Americans are reading at or above grade level in 2006, compared with 44% of Hispanic-Americans and 29% of African-Americans in 2001. *See* Reading and Mathematics, Grades 3 & 12 (May 1, 2006) *available at* http://fcat.fldoe.org/pdf/06gr3gr12mediapacket.pdf. In mathematics, among third graders, 68% of Hispanic-Americans and 54% of African-Americans are on grade level in 2006, compared with 44% of Hispanic-Americans and 29% of African-Americans in 2001. *Id.*

Most recently, the legislature enacted Florida's Voluntary Pre-kindergarten Program, Fla. Stat. §§ 1002.53, 1002.55, 1002.61 2005, a school choice program providing free pre-kindergarten education to any four-year old child in Florida. As in both Maine's voucher program and Florida's McKay Program and the recently stricken Opportunity Scholarship Program ("OSP") (as discussed *infra*), parents are responsible for selecting a school, whether religious or non-religious, for their children and then restrictively endorsing the warrant to the chosen school. *See* Fla. Stat. § 1002.39(6)(f) (2005).

Recent Threats to Neutrality in Florida

Florida's First District Court of Appeal, relying upon *Locke v. Davey*, 540 U.S. 712 (2004), struck down under Florida's Blaine amendment the participation of private schools in the OSP (the "private OSP option"), notwithstanding the Program's educational success. *See Bush v. Holmes,* 886 So. 2d 340, 360 (Fla. 1st DCA 2004) (citing Fla. Const. art. I, § 3 (1968)) (*en banc*), *aff'd in part*, 919 So. 2d 392 (Fla. 2006). That court held that the Free Exercise Clause of the First Amendment to the United States Constitution does not require Florida to afford religious entities equal participation in programs of general applicability that are both neutral towards religion and that have a secular purpose. *Id.* The Florida Supreme Court affirmed the ruling on other grounds. *Bush v. Holmes*, 919 So. 2d 392, 413 (Fla. 2006).

Because the First District Court of Appeal's decision was premised upon reasoning quite similar to the Maine Supreme Court's in the instant case, Florida's remaining scholarship programs outlined above are vulnerable unless this Court corrects the misinterpretation of *Locke* by the Maine Supreme Court and Florida's First District Court of Appeal. Because of the risk to these neutral educational scholarship programs, *amici curiae* urge this Court to grant the petition for writ of certiorari to settle

the important federal questions that petitioners have raised in the interest of student and parental choice, religious neutrality, and educational achievement in all states. *Amici curiae* would rephrase the second question presented as follows:

> Does this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), permit Maine to exclude religious persons entirely from an otherwise neutral, generally available, public educational scholarship program with a secular purpose?

SUMMARY OF ARGUMENT

Maine's voucher program discriminates on its face against persons solely because they are religious. This Court in *Locke* upheld the Washington Promise Scholarship Program because, although students could not receive scholarships to pursue a clerical degree, they could pursue every other degree program at devoutly religious schools even while taking classes in devotional theology. The Maine Supreme Court misinterpreted *Locke* to hold that Maine could prohibit altogether that which this Court said rendered the Promise Scholarship Program constitutional – the Program went "a long way toward including religion in its benefits." 540 U.S. at 724. The court also applied the wrong standard of constitutional review.

Maine's withholding of tuition vouchers from parents who want to send their children to religious schools, contrary to the state's historic practice, demonstrates hostility to religion to the objective observer, rendering it unconstitutional under the First and Fourteenth Amendments. This disparate treatment alone, without civil or criminal sanctions, a "violation of their religion," or anything more, violates the Free Exercise and Equal Protection Clauses. Maine's discriminatory statute is identical in effect to Florida's Blaine amendment, as interpreted by Florida's appellate court. Maine's alleged interest in seeking to avoid excessive entanglement with religion can be achieved through means far less restrictive and, thus, more narrowly tailored than excluding otherwise eligible religious persons from a K-12 scholarship program.

ARGUMENT

Florida's First District Court of Appeal extended *Locke* far beyond the limited application intended. *See Bush,* 886 So. 2d at 360. Now, the Supreme Court of Maine has done the same in upholding a statute that is facially discriminatory towards religious persons merely because they are religious. *See Anderson,* 895 A.2d at 961. ME. REV. STAT ANN. tit. 20, § 2951(2), states, "A private school may be approved for the receipt of public funds for tuition only if it . . . (2) . . . is nonsectarian in nature in accordance with the First Amendment of the United States Constitution." *See Anderson*, 895 A.2d at 949. The statute guides the implementation of Title 20-A, which authorizes the State's Department of Education and school districts to build their own high schools, to contract with other school district or eligible private schools, or, when there is no high school in a district, to use public funds to pay the tuition costs at an eligible private school of the parents' choice. *See id.* at 948.

Prior to 1980, Maine, like Florida, had a long history of allowing public funds to be used for tuition payments at approved sectarian schools. *See id.* Maine abandoned this tradition in 1980, when the legislature adopted ME. REV. STAT. ANN. tit. 20, § 2951(2), in response to the attorney general's opinion that the practice violated the Establishment Clause. *See id.* Upholding the statute despite its improper rationale, *see Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), the Supreme Court of Maine reasoned, like the Florida First District Court of Appeal, that *Locke* permitted the legislature to exclude religious persons from the state K-12 voucher program without triggering a federal free exercise, establishment or equal protection violation. *See Anderson,* 895 A.2d at 961. Both state courts have misinterpreted the requirements of the First and Fourteenth Amendments of the United States Constitution.

I. AS INTERPRETED BY MAINE'S SUPREME COURT, ME. REV. STAT. ANN. TIT. 20, § 2951(2) VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A law that is not neutral and withholds a generally available, public benefit from an individual on the basis of religion is subject to strict scrutiny under the Free Exercise Clause of the United States Constitution. *See Lukumi*, 508 U.S. at 546; *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (holding that New Jersey could not withhold the benefits of general welfare legislation on the basis of an individual's faith or lack thereof); *see also Locke*, 540 U.S. at 726-27 (Scalia and Thomas, JJ., dissenting) ("When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured[.]"); *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998) (strict scrutiny applied to facially discriminatory law allowing funding for paraprofessionals to assist disabled children in the classroom so long as those children did not attend religious schools); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) (strict scrutiny applied to Army regulation governing the provision of child care on base barring providers from engaging in religious practices).

The minimum standard, when assessing a statute's neutrality, is that it not be facially discriminatory. *Lukumi*, 508 U.S. at 533. *See also Locke*, 540 U.S. at 726 (Scalia and Thomas, JJ., dissenting) (referring to facial neutrality as a "'necessary condition for free exercise constitutionality'") (citing *Lukumi*, 508 U.S. at 563). The exception to this rule fashioned by Maine's Supreme Court in an effort to apply rational basis review to the exclusion of eligible religious persons from a K-12 scholarship program, *see Anderson*, 895 A. 2d at 959, is unsupported by *Locke* and other precedent. It may be true that the Establishment Clause itself discriminates against religion "by singling it out as the one thing the States cannot establish," but

this simply means that the States have "a compelling interest in not committing *actual* Establishment Clause violations." *See Locke*, 540 U.S. at 730 n.2 (Scalia and Thomas, JJ., dissenting) (emphasis in original). *Anderson* perpetuates a "shameful pedigree" of hostility toward religion which this Court should not hesitate to review and disavow. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

A. The Maine Supreme Court Has Misread *Locke* and Thereby Permitted Unlawful Discrimination Against Religious Persons.

Locke supports not the exclusion of religious persons from Maine's scholarship program, but their inclusion. This Court in *Locke* upheld a Washington scholarship program wholly different from the one before the Maine Supreme Court. Washington scholarship recipients were permitted to use an award to pursue a broad variety of college degrees at "pervasively religious schools" while taking "devotional theology courses." *Locke*, 540 U.S. at 724-25. They were barred from using scholarship funds to pursue only an essentially religious endeavor; *i.e.*, a "degree in theology." *Id.* at 716. In contrast to Maine and Florida's tradition of neutral public funding for K-12 education, this Court affirmed the exclusion of *only* the ministry from receiving state dollars on the basis of a deeply-rooted American tradition manifest in early taxpayer protests, *id.* at 722, and state constitutions. *Id.* at 723. This reinforced the Court's "conclusion that religious instruction is of a different ilk." *Id.*

Besides clerical college degrees, "there are few areas in which a state's antiestablishment interests" justify the type of exclusion practiced by Maine. *Id.* at 722. Education of K-12 schoolchildren does not qualify. As the dissent below pointed out, "[P]rimary and secondary education . . . is compulsory for all

students in Maine, and in no way constitutes the 'training for religious professions' that uniquely limited the Supreme Court's holding in *Locke*." *Anderson*, 895 A.2d at 964 (Clifford, J., dissenting). In fact, the very reasons this Court gave in *Locke* for why the Promise Scholarship Program was constitutional – that it permitted the expenditure of scholarships on all but clerical training in religious and non-religious schools – are precisely those requiring § 2951(2) to be overturned under the Free Exercise Clause. 540 U.S. at 724.

Whereas the use of public funds to support church leaders has long been considered one of the "hallmarks of 'established' religion," *see id.* at 722, the question of establishment is not even debatable in the case of Maine's school choice program. *See Zelman*, 536 U.S. at 655 (holding that an Ohio school choice program that allowed state tuition vouchers to be used at private religious schools did not violate the Establishment Clause). Yet avoiding an establishment was the only compelling governmental interest that Maine identified as justifying the enactment of § 2951(2), and which the statute itself referenced. As the dissent below notes, the statute should, therefore, have been stricken under the court's prior holding that "[i]f the State's justification is based on an erroneous understanding of the Establishment Clause, its justification will not withstand any level of scrutiny." *Anderson*, 895 A.2d at 963 (Clifford, J., dissenting) (citing *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 137-38 (Me. 1999), *cert. denied*, 528 U.S. 947 (1999)).

> The compelling governmental interest that justified the enactment of section 2951(2) . . . is no longer operative, and, accordingly, there is no longer any kind of compelling State interest that justifies the unequal treatment mandated by section 2951(2). Section 2951(2) can no longer withstand strict scrutiny analysis. Further, even if *Locke* is read more broadly than its language

> would seem to allow, and a rational relationship test is applied to the equal protection interests of the parents, there is no legitimate rationale that should be considered by the Court to justify the discrimination manifested in section 2951(2).

See id. at 965; *Hartmann*, 68 F.3d at 979 ("A program that violates the Free Exercise Clause cannot be saved by relying on implausible Establishment Clause concerns.").

This Court in *Locke* reaffirmed that there can be "play in the joints" between the federal religion clauses when there is (1) a long-standing practice dating to the founding of the republic excluding public funding for religious training, and (2) a "close call" as to whether complying with one of the federal religion clauses could violate the other. *See* 540 U.S. at 728 (Scalia and Thomas, JJ., dissenting). It can hardly be said that either Maine or Florida has any historic practice of excluding religious persons from educational scholarship programs or that Maine's pre-1980 practice of using public money to fund tuition vouchers at religious and non-religious schools was a "close call" on the Establishment Clause issue. *See Zelman*, 536 U.S. at 662-63. Maine and Florida's historic practice is more like the "benevolent neutrality" called for in *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970), where the "play in the joints" principle finds its roots in upholding another firmly-rooted historical practice, exempting church property from taxation. *Id.* at 673, 677. *Accord Holmes*, 886 So. 2d at 388 (Polston, J., dissenting) ("State action may be permitted within the space of 'play in the joints' when it is 'productive of a benevolent neutrality' according to *Walz*.")

Maine's Supreme Court hypothesized, even in the wake of *Zelman*, that it "remains conceivable" for indirect funding of scholarship programs in which religious schools participate to violate the Establishment Clause. *See Anderson*, 895 A.2d at

960. As petitioners argue, this threat is valid only in direct aid, not indirect aid cases such as this one. *See* Petition, at 17-19. But even if this were not true, the mere potential for a violation of the Establishment Clause is neither a compelling nor rational basis to justify the discrimination manifest in § 2951(2). Maine's Supreme Court concedes even in this case that a state is "permitted to pass a statute authorizing some form of tuition payments to religious schools[.]" *Anderson*, 895 A.2d at 961. If § 2951(2) were stricken, Maine's voucher system would not be unconstitutional, but simply begin functioning as it had prior to 1980. *See id.* at 948 (citing Op. Me. Att'y Gen 80-2). *Anderson* discusses no instance from 1879 to 1980, when the scholarship program led to an *actual* violation of the Establishment Clause. *Cf. id* at 962 (Clifford, J., dissenting) ("The system worked very well[.]"). Accordingly, the Maine Supreme Court has misinterpreted *Locke* and permitted unlawful discrimination against religious persons.

B. The Objective Observer Would Conclude that ME. REV. STAT. ANN. tit. 20, § 2951(2) Manifests Hostility Toward Religion.

Maine's exclusion of eligible religious persons from a tuition scholarship program broadcasts an unmistakable signal to the objective observer, contrary to the First Amendment, that religious persons are second-class citizens and religious schools are not the equal of others in the pursuit of an educated citizenry. According to Justice O'Connor, the objective observer is similar to the "reasonable person" in tort law, who "'is not to be identified with any ordinary individual,'" but is "'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'" *Capitol Sq. Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, Souter and Breyer, JJ., concurring in part and concurring in judgment) (citing W. KEETON, KEETON ON LAW OF

TORTS 175, 5th ed. 1984). This hypothetical observer is "presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *See McCreary County, Ky. v. ACLU*, __ U.S. __, 125 S. Ct. 2722, 2737 (2005) (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (objective observer is familiar with "'implementation of'" government action) (quoting *Wallace v. Jaffree*, 472 U.S. 38 (1985) (O'Connor, J., concurring in judgment); *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987) (inquiry looks to "the historical context of the statute . . . and the specific sequence of events leading to [its] passage"); *Pinette*, 515 U.S. at 780 ("[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community . . . in which the religious display appears.")); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118 (2001) (warning against government sending a message of hostility toward the religious viewpoint). Consequently, the objective observer would know of Maine's historic neutral public scholarship practice.

The objective observer would also be acquainted with "the text, legislative history, and implementation" of § 2951(2), *see Santa Fe*, 530 U.S. at 308 (citation omitted); Maine Const. art. VIII, pt. 1 § 1 (authorizing state grants for the founding of private schools including religious ones); this Court's precedent, including the invalidation by *Zelman* of the singular rationale for Maine's exclusion, *see McCreary*, 125 S. Ct. at 2737; *Pinette*, 515 U.S. at 782; and realize the type and scope of students affected by *Anderson* is much different than in *Locke*. In the latter, only students pursuing post-secondary training for a ministerial career were treated differently, *see Locke*, 540 U.S. at 722, whereas § 2951(2) treats differently all students pursuing a compulsory K-12 education at religious schools. *See Anderson*, 895 A.2d at 948. The sheer number of students precluded from receiving an education at the school of their choice, the amount of the scholarship over a number of years, and the number of

schools and curricular areas affected in Maine is greater than in *Locke*. *Accord* Petition, at 29. Whereas this Court has considered "training for religious professions and training for secular professions . . . not fungible," the same cannot be said of a religious or secular K-12 education when it comes to preparing children for post-secondary education or careers. *Locke*, 540 U.S. at 721. The education has an essentially secular purpose, as opposed to clerical training. Consequently, the objective observer would conclude that § 2951(2) violates the Establishment Clause.

ME. REV. STAT ANN. tit. 20, § 2951(2) is more discriminatory than even the city ordinances at issue in *Lukumi* at 546, where the City of Hialeah had enacted laws in effect banning the ritualistic sacrifice of animals and targeting the Santeria. *See id.* at 527-28. This Court found that the ordinances in *Lukumi*, as in this case, had twin defects: (1) they were not facially neutral and (2) they lacked general applicability, *see id* at 542, 545-46; however, this Court had to go beyond the text of the ordinances to examine their object in *Lukumi*. *Cf. id.* at 557-58 (Scalia and Rehnquist, JJ., concurring in part and concurring in judgment) (distinguishing the defect of lack of neutrality as applying "primarily to those laws that by their terms impose disabilities on the basis of religion" from the defect of lack of general applicability which applies "primarily to those laws which, though neutral in their terms . . . target the practices of a particular religion for discriminatory treatment[.]"). In this case, no searching inquiry into the purposes behind § 2951(2) is necessary. Its text lacks even the pretense of neutrality as it explicitly disqualifies religious schools from participating in the tuition program. This Court could stop there and overrule the Maine Supreme Court, but looking further for the indicia of religious animus discussed in *Lukumi*, 508 U.S. at 534-35, 540, would only support the ruling that § 2951(2) is nonneutral. For example, Maine had a tradition of neutral public funding for education interrupted by the statute; "[t]he specific series of

events leading to the enactment or official policy in question" were premised exclusively upon federal Establishment Clause concerns; and the legislative and administrative history of § 2951(2) reveal that Maine substituted *post hoc* rationalizations when the original rationale was vacated. *Id.* at 540. These objective indicia bear on the statute's nonneutrality and discriminatory object. *Id.*

"[N]o law that is nonneutral . . . can be thought to be of general applicability." *Id.* at 558 (Scalia and Rehnquist, JJ., concurring in part and concurring in judgment). In addition, as in *Lukumi*, § 2951(2) is substantially overinclusive and underinclusive. *See id.* at 538-40, 543-46. Section 2951(2) is underinclusive because the statute is inadequate to "maintain[] diversity within the public schools[] and avoid[] involvement in discrimination in admissions and hiring[.]" *See Anderson*, 895 A.2d at 960. Petitioners and the dissent are correct that the court should never have considered *post hoc* justifications for Maine's exclusion. *See* Petition at 13-16, *see also id.* at 965 (Clifford, J., dissenting). In addition, the Court's consideration was incomplete. Section 2951(2) "fail[ed] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree[.]" *Lukumi*, 508 U.S. at 543. Thus, the conclusion is inexorable that § 2951(2) is unconstitutional because it pursues "governmental interests only against conduct motivated by religious belief." *Id.* at 545.

In addition, § 2951(2) is unconstitutional because it is overinclusive insofar as it precludes students from using scholarships at religious schools complying with the state's academic standards, curriculum, record-keeping requirements, and anti-discrimination laws. *Cf. Anderson*, 895 A.2d at 961. To the extent these are legitimate government interests proper for the court to consider, "they could be addressed by restrictions stopping far short of a flat prohibition[.]" *Locke*, 508 U.S. at 538. Rather than excluding religious persons from public programs in

the interest of avoiding excessive entanglement, Maine could have adopted, for example, generally applicable rules and performance criteria for eligible private schools. *See, e.g.*, Chapter 2006 Fla. Laws ch. 75 (2006). Because § 2951(2) is not narrowly tailored to achieve Maine's only stated interest, it amounts to a poorly shrouded "'religious gerrymander'. . . an impermissible attempt to target petitioners and their religious practices." *Lukumi*, 508 U.S. at 535. *Accord Peter*, 155 F.3d at 997 (ban on funding for paraprofessionals to assist disabled children attending religious schools was not narrowly tailored and unconstitutional); *Hartmann*, 68 F.3d at 979 (ban on child care providers engaging in religious exercise was not the "least restrictive means necessary to prevent an unconstitutional entanglement with religion"). The objective observer would see through it and conclude that § 2951(2) manifests hostility toward religion.

C. Prohibiting Eligible Persons from Receiving Public Scholarships to Attend Religious Schools Violates the Free Exercise and Equal Protection Clauses.

Maine's withholding of tuition vouchers from parents who want to send their children to religious schools violates the constitution. The disparate treatment alone, without criminal or civil sanctions, "violations of religion," or anything more, violates the Free Exercise and Equal Protection Clauses. Even if there was no anti-religious animus underlying Maine's statute, "'[it does not] matter that a legislature consists entirely of the purehearted, if the law it enacts in fact singles out a religious practice for special burdens.'" *Locke*, 540 U.S. at 732 (Scalia and Thomas, JJ., dissenting) (citing *Lukumi*, 508 U.S. at 559). Discrimination against persons on the basis of religion is no more defensible than on the basis of race, nationality, or gender. In Florida, racial and religious discrimination even have a common constitutional heritage in the Constitution of 1885. *See* Fla.

Const. art. XII, § 12 (1885) (separate but equal doctrine) and Fla. Const. art. VI, § 6 (1885) (Blaine amendment).

1. The Imposition of Criminal Sanctions Is Wholly Unnecessary to Find a Free Exercise or Equal Protection Clause Violation.

That § 2951(2) does not impose a civil or criminal penalty on the citizens of Maine is wholly unnecessary to find a Free Exercise or Equal Protection Clause violation. It suffices to trigger strict scrutiny that the statute is not neutral and facially precludes religious schools from participating in a generally available educational program solely because of their religious affiliation. *See Sherbert*, 374 U.S. at 404 ("[I]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."); *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990) (facially neutral laws that burden religion are constitutional, but not their opposite); *see also Locke*, 540 U.S. at 731 (Scalia and Thomas, JJ., dissenting) ("The indignity of being singled out for special burdens on the basis of one's religious calling is so profound that the concrete harm produced can never be dismissed as insubstantial."); *Hartmann*, 68 F.3d at 979 n.4 (a categorical ban on child care providers engaging in religious exercise was unconstitutional without proof of a substantial burden on religious exercise). Nevertheless, misinterpreting *Locke*, the Supreme Court of Maine held that, because § 2951(2) did not impose sanctions, force students to choose between getting a public benefit and adhering to their religion, or prevent parents from sending their children to religious schools, any manifest religious hostility in law was negligible and, in effect, not constitutionally cognizable. *See Anderson*, 895 A.2d at 956, 959 (explaining that § 2951(2) imposes no impermissible burden on religion).

Whatever the relevance of assessing the degree of religious disfavor inherent in excluding ministerial majors from a neutral scholarship program, conditioning a constitutional violation in this case on the imposition of penalties beyond disparate treatment is inappropriate. In no other context besides scholarships for educating ministers has this Court required criminal penalties as a litmus test for prohibiting the exclusion of persons from an otherwise generally available educational benefit. *See Locke*, 540 U.S. at 732 (Scalia and Thomas, JJ., dissenting). For example, it was enough that African-American students and females were unjustly excluded from public schools without a compelling (racial discrimination) or important (gender discrimination) governmental interest. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overturning segregation of public school children based on race and the doctrine of "separate but equal"); *United States v. Virginia*, 518 U.S. 515 (1996) (overturning exclusion of women from public military academy). In addition, although this Court has found that civil or criminal penalties imposed upon religious practice *may* lead to a constitutional violation, this Court has not deemed the penalties either sufficient, *see, e.g.*, *United States v. Lee*, 455 U.S. 252 (1982) (Amish forced to pay tax penalties nowithstanding religious claim), or necessary. *See Sherbert*, 374 U.S. at 403-04 ("[I]t is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry.").

Yet, even if the degree of discrimination were somehow relevant to the outcome of this case, the effect of § 2951(2) is far more discriminatory than Washington's Promise Scholarship Program, *see Locke*, 540 U.S. at 722, and, indeed, than the statute at stake in *Lukumi*. *See infra* at 17. Once more, the state's counterbalanced interest in preventing excessive entanglement is weaker than Washington's interest in not funding clerical education consistent with historic practice. Rather than the "mild" discrimination evident in *Locke*, § 2951(2) imposes a

special disability based only on religion on a whole class of persons who have no choice but to enroll their children in K-12 education. Davey had the choice to pursue post-secondary education and a devotional theology degree. If he did not, Washington could not enforce truancy laws against him, but Maine would against the children involved in this case. Maine's Supreme Court hypothesized that parents acting on their religious beliefs who desired to school their children in their faith tradition could still do so, albeit at an increased cost to themselves. *See Anderson*, 895 A.2d at 956 (citing *Eulitt v. Maine, Dep't of Educ.*, 386 F.3d 344, 354-55 (1st Cir. 2004)). But we know that many would altogether lack the means. For them, Maine's exclusion is total without exception from state truancy laws. The rest may be forgiven for viewing as a "civil penalty" the annual school tuition payments only they must render.

2. A Statute Violates the Free Exercise Clause Through Hostility Towards Religious Practice, Regardless of Whether the Statute Compels Members of Any Religion to Violate the Core Tenets of Their Faith.

The Supreme Court of Maine pointed out that none of the parties to *Anderson* asserted that they were bound by their religious beliefs to send their children to religious schools or to prevent their children from attending secular schools, and refused to extend free expression to an activity that was not fundamentally religious. *See Anderson*, 895 A.2d at 959. Although petitioners' religious beliefs did not *mandate* sending their children to sectarian schools or *proscribe* sending their children to secular schools, their desire to send their children to religious schools was certainly an expression of sincerely-held religious convictions. *See id.* at 950 (petitioners sent their children to religious school "because the school promotes their

sincerely held beliefs as Catholics"); *see also Locke*, 540 U.S. at 722 (citing the petitioner's statement that his "religious beliefs were the only reason for [him] to seek a college degree"); *Proverbs 22:6* (King James) ("Train up a child in the way he should go: and when he is old, he will not depart from it."). It was not a mere preference or choice as between one public school and another. Ordinarily, this Court has required far less than petitioners' kind of religious conviction to find a constitutional violation when persons were granted unequal access to educational benefits. *See Virginia*, 518 U.S. at 523 (female applicants "want[ed] to attend" a publicly-funded military academy).

Requiring adherents to establish "violations of their religion" as a condition of stating a constitutional claim for unequal treatment invariably disadvantages religions, contrary to the Establishment Clause, such as many forms of Christianity which provide for the freedom of believers subject to their consciences. *See Sherbert*, 374 U.S. at 404 ("'[I]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.'") (citing *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)). It is also directly contrary to this Court's warning in *Smith*, that government's ability to carry out public policy "'cannot depend on measuring the effects of governmental action on a religious objector's spiritual development.'" 494 U.S. at 885 (citing *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988)). Repeatedly, this Court has said that it is not within the judicial ken to "determine the place of a particular belief in a religion or the plausibility of a religious claim." *Id.* at 887.

The First Amendment "guarantees *free* exercise of religion, and when the State exacts a financial penalty . . . for religious exercise – whether by tax or by forfeiture of an

otherwise available benefit – religious practice is anything *but* free." *See Locke*, 540 U.S. at 731 (Scalia and Thomas, JJ., dissenting) (emphasis original). Protected religious exercise is not merely the expression of required orthodoxy, as intimated by the Maine Supreme Court, but also of parents' sincere belief that schooling children in their faith tradition is important. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).[4] To be sure, this is not a case as in *Pierce*, where a state denied pupils access altogether to religious schools, but neither is this a case, as the Supreme Court of Maine characterizes it, merely about petitioners' paying more to exercise a privilege. Consistent with *Lukumi*, *Smith*, and the raft of this Court's precedent overturning racial and gender discrimination and viewpoint discrimination in public forums, petitioners seek no special treatment – just access to a generally available public tuition program. Specially disadvantaging them, without more, violates the Free Exercise and Equal Protection Clauses. *See Smith*, 494 U.S. at 877 ("The government may not . . . impose special disabilities on the basis of religious views or religious status[.]") (citing, *inter alia*, *McDaniel v. Paty*, 435 U.S. 618 (1978)); *Sherbert*, 374 U.S. at 404; *accord Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002), *cert. denied*, 539 U.S. 942 (2003).

The Supreme Court of Maine's assertion that no fundamental religious right is violated when the state refuses to fund tuition at religious schools, *see Anderson*, 895 A.2d at 959, also undermines Maine's contention that the prohibition is necessary to prevent excessive entanglement. If the parents are not expressing their religious beliefs when they send their children to religious schools, then Maine's assertion about preventing excessive entanglement is disingenuous. If the

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[4]Demand for the state to fund a private religious education when students are not otherwise eligible would be an entirely different case. *See Children A&B v. Florida*, 355 F. Supp. 2d 1298 (N.D. Fla. 2004), *aff'd*, 140 Fed. Appx 845 (11th Cir. 2005).

parents are expressing their religious convictions when they choose to send their children to a religious school, then Maine is inhibiting their free expression of religion. Maine cannot have it both ways. The Maine Court's reasoning serves not to support its result, but only to underscore the pretextual nature of Maine's rationale for § 2951(2).

3. Maine's Discriminatory Statute Is Identical in Effect to Florida's Blaine Amendment.

In *Anderson*, the Maine Supreme Court noted that the Maine Constitution does not include a Blaine amendment. 895 A.2d at 956 n.13. Ironically, the legislature in James G. Blaine's home state rejected the amendment because of the number of religious schools receiving state funding. *See* Petition, at 26. Following *Zelman*, the court might, therefore, have inferred from this that the state lacked even a hypothetical compelling or rational interest in enforcing § 2951(2). *See* Maine Const. art. VIII, pt. 1 §1; *see also Holmes*, 886 So. 2d at 559-60 (suggesting a state may require greater separation than the Establishment Clause). *But see Widmar v. Vincent*, 454 U.S. 263, 277 (1981) ("[T]he state interest asserted here – in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution – is limited by the Free Exercise Clause[.]"). Instead, the Maine Supreme Court took this as a positive sign and went on to approve the exclusion of religious schools from a public tuition scholarship program.

A special disability imposed solely on the basis of religious status as a result of a state Blaine amendment such as Florida's would be an additional reason to overrule a decision such as *Holmes*. *See* Art. I § 3 (1968) ("No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian

institution."). Blaine amendments "have their roots in conflicts between supporters of public schools and supporters of religious, often Catholic, schools in the late nineteenth century." *Anderson*, 895 A.2d at 956 n.13. Florida's Blaine amendment, including its enactment in 1885 and enforcement in the 1910s, is inextricably tied to racial and religious bigotry. *See supra*, at 3-4. A majority of this Court has expressed deep reservations about the constitutionality of a state Blaine amendment. In *Mitchell*, 530 U.S. at 829, the plurality concluded that "the exclusion of pervasively sectarian schools from otherwise permissible aid programs" is premised upon a "doctrine, born of bigotry, [that] should be buried now." Joining this plurality, the dissent in *Zelman* recognized that Blaine amendments were intended to disadvantage Catholics and other religious groups. 536 U.S. 720-21 (2002) (Breyer, J., dissenting). *See also Lemon v. Kurtzman*, 403 U.S. 602, 645-46 (1971) (Brennan, J., concurring). In *Locke*, this Court took pains to emphasize it was not reviewing such an amendment. 540 U.S. at 723-24 n.7.

Notwithstanding this precedent and the prejudicial pedigree of Florida's Blaine amendment, the First District Court of Appeal, when it struck down the private OSP option, disagreed with this Court as to whether Blaine-era amendments generally and Florida's in particular are based on bigotry. *See Holmes*, 886 So. 2d at 351 n.9 ("[H]ere, there is no evidence of religious bigotry, relating to Florida's no-aid provision."); *but see id.* at 349 (stating that the intent of the Blaine amendment was to preclude public funding for religious schools). The Florida court failed even to wrestle with this Court's presumption against the constitutionality of a Blaine amendment; therefore, the reasoning of *Holmes* and *Anderson* is similar. *See Holmes,* 886 So. 2d at 360 (*Locke* recognized that "a state . . . can preclude state financial aid to religious institutions without violating either the Establishment Clause or Free Exercise Clause."); *see also id.* at 363 (relying upon *Eulitt v. Maine*, 386 F. 3d 344 (1st Cir. 2004).

The result of the decisions is also identical: tuition vouchers were withheld from parents who want to send their children to religious schools to receive a K-12 education. In addition, both decisions were premised upon an erroneous interpretation of the First Amendment. The Maine Supreme Court upheld an *exclusionary* statute on this basis, whereas the Florida court struck down an *inclusionary* one. The consequences of *these* decisions are more far-reaching than in *Locke*, although the impact of *Holmes* is likely to be even broader than *Anderson*, as many more neutral educational scholarship programs outlined above (*see infra* at 4-7), in addition to non-educational programs, are implicated. *See Holmes*, 886 So. 2d at 376-78, 388-89 (Polston, J., dissenting). These consequences of Florida's Blaine amendment, as interpreted by *Holmes*, and § 2951(2) demonstrate hostility to religion to the objective observer, contrary to the concerted action of the Establishment Clause, the Free Exercise Clause and the Equal Protection Clause "to prohibit state action that restricts, limits, or divests one's legal rights, duties or benefits based on his or her religion." *Id.* at 390 (Polston, J., dissenting). Therefore, this Court should review and overturn *Anderson*.

CONCLUSION

ME. REV. STAT ANN. tit. 20, § 2951(2) violates the First and Fourteenth Amendments to the United States Constitution. State courts have misinterpreted *Locke* and *Lukumi* to permit the exclusion of religious persons solely on the basis of their religious affiliation from K-12 public scholarship programs. Consequently, this Court should grant the petition for certiorari to clarify whether the practice violates the federal constitution.

Respectfully submitted,

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